



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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OFFICE OF
WATER

**TESTIMONY OF
J. CHARLES FOX
ASSISTANT ADMINISTRATOR FOR WATER
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
SUBCOMMITTEE ON FISHERIES, WILDLIFE AND WATER
OF THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE
June 21, 2000**

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INTRODUCTION

Good morning Mr. Chairman and members of the Committee. I am Chuck Fox, Assistant Administrator for Water at the U.S. Environmental Protection Agency (EPA).

I look forward to talking with you this morning about the Nation's clean water program and, more specifically, to support the "Good Samaritan Abandoned or Inactive Mine Waste Remediation Act" (S. 1787) introduced by Senator Baucus and others. This legislation will promote efforts to mitigate the effects of pollutants discharged from abandoned or inactive mines into the Nation's streams, rivers and lakes.

BACKGROUND

Despite the great progress that has been made in improving the Nation's water quality since the passage of the Federal Water Pollution Control Act in 1972, serious water quality problems persist.

States reported in 1998 that 35% of the rivers and streams they assessed do not meet clean water goals and another 10% of waters are threatened. In the case of lakes and ponds, 45% of these waters do not meet water quality goals and 9% are threatened. And, 44% of the coastal and estuarine waters that States assessed do not meet their clean water goals and 9% are threatened. In the Great Lakes, fully 96% of the shoreline miles assessed do not meet clean water goals. Based on this data, the States indicate that over 20,000 waterbodies are polluted and need the focused attention in order to recover.

In the western States, one of the more serious threats to this Nation's water quality is pollution contributed by thousands of abandoned or inactive mines. Mining has a significant economic benefit to the west, but many of these former mine sites left an unfortunate legacy of water pollution or the threat of water pollution.

Exact figures are not available due to the magnitude of historical, small-scale mining activities and the age of many of these abandoned mines, but estimates place the total number of abandoned mine sites at 200,000 to 500,000 for the entire country. An independent assessment by the Western Governor's Association places the total at more than 400,000 in the west alone. Most of these sites are classified as "hardrock" mines that were developed to extract a wide variety of metal-bearing ores. Further complicating the problem is the fact that the majority of these sites were mined and abandoned prior to the enactment of modern environmental regulations in the 1970's.

Estimates of the magnitude of the environmental impacts occurring as a result of historical hardrock mining activities in the western States vary significantly. Not all of these mine sites pose serious threats to human health and the environment. The Western Governors

Association estimates that as many as 80% of the sites may not pose environmental or immediate public safety concerns. However, many mine sites do create significant environmental and public health hazards -- anywhere from 40,000 to 100,000 sites, based upon the previous figures cited.

REGULATORY AUTHORITY -- ABANDONED/INACTIVE MINES

EPA has no single, comprehensive statutory authority to regulate mining and oversee development of environmental performance standards and financial assurances at individual mines. EPA does, however, have statutory authorities to help reduce potential environmental problems at individual mines and has used these authorities to prevent and remediate pollution at a number of mine sites. EPA also has used administrative statutes, such as the National Environmental Policy Act (NEPA), to try to introduce pollution prevention measures during the mine site selection and evaluation phase for new mines.

EPA uses a number of statutory authorities including the Clean Air Act (CAA), Clean Water Act (CWA), the Resources Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation and Recovery Act (CERCLA) -- more commonly referred to as the "Superfund" -- to regulate and remediate hardrock mining activities.

RCRA and CERCLA authorities have only been used for the highest priority sites posing the greatest threats to public health and safety.

A number of sections in the CWA have a direct bearing on regulating both active and remediation activities at abandoned mines. Section 301 prohibits discharges of any pollutant

without a permit. Section 402, which authorizes the National Pollution Discharge Elimination System (NPDES) that requires permits for all discharges into waters of the United States, is the most comprehensive and commonly used authority to regulate all types of mining-related activities. The majority of active mines have CWA discharge permits and many of these permits implement national technology-based effluent limitations developed under section 301 and 304 of the CWA. Section 309 provides very broad enforcement authority that includes issuing administrative penalty orders and assessing penalties.

Closely related to provisions in Section 402 are certain provisions in Section 303(d) that require States to identify water bodies that exceed the prescribed water quality criteria and that the State develop a total maximum daily load (TMDL) limitation on pollutants being discharged into these water quality-limited bodies of water.

Section 504 of the Act, which provides the Administrator with emergency powers to correct all activities that constitute an “imminent and substantial endangerment to public health and welfare,” and Section 505, which permits citizen suits against polluters, also come into play in the overall regulatory scheme.

Unfortunately, there are limitations under the CWA that often hamper remediation and restoration activities at abandoned mine sites. In particular, the permitting requirements under Section 402 of the CWA require that the permittee meet all of the requirements and effluent discharge limits set out in their discharge permit. These discharge limits include water quality standards that have been established for the body of water into which the treated effluent is discharged. In addition, these requirements mean anyone conducting reclamation or remediation at an abandoned mine site may become liable for any continuing discharges from that site.

PROPOSED GOOD SAMARITAN LEGISLATION

S. 1787 would encourage remediation activities for abandoned mine sites where no action would be taken otherwise because of potential liability and costs under the CWA. The Administration generally supports the bill and would like the opportunity to work with the sponsors of the bill and members of this Committee to improve the bill in several respects.

EPA supports the major provisions of the bill including the following critical elements:

- (1) the “Good Samaritan” acting as the remediating party can not have a historical or existing responsibility for the mine site;
- (2) sites are only subject to the bill’s coverage if there is not an identifiable owner or operator of the mine that can clean up the site;
- (3) the permitting authority rests exclusively with EPA, ensuring consistency in application of this innovative approach to environmental regulation under the Act
- (4) a permit may only be issued where it is demonstrated, with reasonable certainty, that improvement in water quality will take place to the maximum extent practicable taking into consideration the resources available to the remediating party;
- (5) public participation in the permit issuance and modification process is ensured;
- (6) the permit is in force until either the site clean up is completed, the discharges are subject to a separate development permit, or the site is left in a condition that at least meets the baseline conditions prior to remediation efforts;
- (7) the bill provides for federal enforcement of permit conditions, and preserves

existing authorities over violations that occurred prior to issuance of the remediation permit; and

- (8) the use or sale associated with any mining conducted as part of the project is restricted to supporting remediation activities.

EPA would like to work with the Committee to address several issues.

The first issue concerns the provision in the bill under section (2)(C) that “The Administrator shall not delegate the authority under subparagraph (A)...” to issue a permit. This prescriptive language would require that the Administrator personally be the authorizing official for each “Good Samaritan” permit. This provision should be amended to enable delegation of permit issuance authority to the Assistant Administrator for Water or Regional Administrators as the Administrator determines appropriate.

The second issue concerns the time frame for issuing amended regulations to address the provisions of the new section 402(q) created by the bill. Section (9)(A) of the bill language states that EPA shall have “...not later than one year after the date of enactment of this subsection...” to issue appropriate regulations. The language goes on further to state that these regulations should be developed “...in consultation with State, tribal and local officials and after providing for public notice.” Given the requirements for consultation with such a large number of potentially interested parties, EPA will need not less than three years to finalize appropriate regulations after the bill becomes law.

Third, the Administration questions the provision of the bill that would make State grant funds for reducing nonpoint pollution under section 319 of the CWA available to pay for implementing controls over point source discharges of pollution from abandoned mine sites.

Fourth, the current bill language does not consider providing “Good Samaritans” with relief from ocean discharge criteria established under section 403(c) of the Clean Water Act. In the proposed legislation, S 1787 allows the Administrator to issue a permit to a “Good Samaritan” ... [all the substantive and procedural safeguards] ..., without compliance with other provisions of section 301, 302 and 402. As you are aware, NPDES permits for discharges to the territorial seas also require compliance with the provisions of section 403(c) of the CWA. To improve the usefulness of this provision, it may be necessary to add language allowing the “Good Samaritan” to also be exempted from provisions of 403(c).

Finally, the bill provides that the permittee may request a modification of a permit. EPA suggests that the Administrator should be allowed to initiate a modification of the permit as needed. The bill should also provide authority for the Administrator to terminate the permit where appropriate. The Administration may provide additional comments.

CONCLUSION

In closing, I do want to take a minute to commend the Western Governor’s Association (WGA) for the work that it has done over the past five years in both identifying issues and developing much of the background data that provided the foundation for the bill. WGA worked closely with a variety stakeholders, such as industry, EPA and other federal agencies and the States, to develop a strong foundation for this bill and to try to include as many perspectives on the proposed approach to remediation of abandoned mines.

The “Good Samaritan” bill has much to offer in addressing and correcting the

environmental insults arising from abandoned mine sites. The Administration is ready and willing to work with the Committee, the States, other Federal agencies, the WGA and any other interested parties to help assure the environmental remediation of abandoned mine sites.

Thank you, Mr. Chairman. I will be happy to answer any questions from the Committee members.